THE NEW-YORK
CITY-HALL RECORDER.

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At a COURT of OYER and TERMINER and General Goal Delivery, holden at the City-Hall of the City of New-York, on the eleventh day of July, in the year of our Lord one thousand eight hundred and seventeen:

BEFORE THE

Hon. WILLIAM W. VAN NESS, *one of the Justices of the Supreme Court of Judicature of the State of New-York.*

JACOB RADCLIFF, *Mayor of the City of New-York.*

WILLIAM BURTIS, and JOSEPH W. BRACKETT, } *Aldermen.*

HUGH MAXWELL, *District Attorney.*

WILLIAM VAN HOOK, *Clerk pro tem.*

(LIBEL.—COSTS IN CRIMINAL CASES.)

WILLIAM COLEMAN'S CASE.

On the traverse of an indictment for a Libel, impeaching the official conduct of the prosecutor, a challenge of a juror to the favor, on behalf of the prosecution, on the ground that the juror had entertained hostile feelings against the prosecutor, by reason of a transaction touching his official duties, is well taken.

That a Libel published against the Clerk of a Court of General Sessions of the Peace, was written by the District Attorney of that Court, and delivered to the defendant for publication, who is the Editor of a public newspaper—is admissible in evidence, to show the want of malice.

When the publication complained of as a Libel, in substance charges the prosecutor with having received divers sums of money, in divers instances, which neither the law, nor *the rules or the practice of the Court*, authorized, and the defendant in such prosecution, to prove the truth of such charge, in justification produces a number of witnesses, who swear to divers sums paid by them to the prosecutor as Clerk, alleged to be illegal, it seems that the minutes of the Court kept by the prosecutor, as Clerk, will be received as only *prima facie* evidence of the facts relating to such charges: the orders of the Court contained in such minutes, and bills of costs sanctioned by the Judges of the Court, containing charges which such Clerk was in the habit of making, may be read, for the purpose of repelling such charges in the Libel as relate to the *rules and practice* of such Court, but not to show such charges were legal.

Quere—Whether a party indicted in the Court of Sessions, who is acquitted by verdict, or otherwise, is bound by law, in any case, to pay costs?

MAXWELL & GARDENIER, *Counsel for the prosecution.*

EMMET, HOFFMAN, OGDEN & PRICE, *Counsel for the defendant.*

The defendant, the Editor of the Evening Post, was indicted, during the sitting of the Court of Oyer and Terminer, in this city, in the month of December last, for a Libel published in that paper of the 30th of September preceding, of and concerning the official conduct of Robert Macomb, as Clerk of the Court of Sessions in and for this city.

Jeduthan Cadwell, on being called as a juror, was objected to on the part of the prosecution, on the ground, that having been heretofore indicted in the Court of Sessions, the juror had been called on for a bill of costs by the prosecutor, which he, the juror, considered extravagant, and by reason thereof his feelings were not impartial.

The two first jurors called on the panel were sworn as triors, and Maxwell called on Cadwell as a witness; and after having proved by him, that on a certain occasion he had been indicted in the Court of Sessions for an assault and battery, and been called on by the prosecutor for a bill which he considered extravagant, Maxwell put this question to the witness: whether, by reason of that transaction, the feelings of the witness were such that sitting as a juror in this case, he would be indifferent, as between the people and the defendant?

Emmet objected to this question, and to the ground assumed by the public prosecutor in this challenge; because, as the counsel argued, the issue to be tried is between the *people*, on the one hand, and the *defendant* on the other. And Col. Macomb had nothing to do with the prosecution, except as a witness.

Maxwell contended to the Court, that although this prosecution was ostensibly in favor of the people against the defendant, yet in reality Col. Macomb was a party. His official conduct was called in question on this occasion; and the juror, from the facts already disclosed, could not be considered indifferent between the prosecutor and the defendant. In support of his argument the counsel cited to the Court, Trials per pais, p. 204.

The Court decided that the question proposed to the witness was proper: but his answer to the inquiry was, that since the affair took place he had thought very little about it; and, though he would prefer being excused from sitting as a juror, yet he did not consider his feelings such but that he could

serve in that capacity in the case as an indifferent juror.

After the decision of the triors against the challenge, Maxwell proceeded to open the case to the jury:

Gentlemen of the jury:—This is an indictment against William Coleman, the Editor of the Evening Post, for a Libel published in his paper of the 30th of September last. Col. Macomb, gentlemen, is the Clerk of the Court of Sessions in this city, and the Libel which I am about to read to you impeaches his official conduct in various particulars.

The prosecutor, however, has selected two specific charges, which he has made the foundation of this indictment.

1. "Do you consider yourself authorized, by law, at your own will and pleasure, out of Court, to estreat any recognizance, or to make use of any threat to enforce the payment of any of the foregoing demands?

2. "Is it true, that in a late case of assault and battery, you undertook to settle the matter for the defendant before the Court commenced, and received your cost; that, however, the party who commenced, and who had only the right of making such settlement, not being apprized of it, the prosecution went forward; but upon a disclosure of all the circumstances to the Court, a *nolle prosequi* was ordered; and, is it true, I ask, that you had the assurance to demand about $17 additional costs from the defendant, which you pretended, accrued in consequence of the prosecution not being stopped?"

You will here perceive, gentlemen, continued the counsel, that the charges are directly levelled against Col. Macomb, in his official capacity. He is willing to have his public conduct investigated in the face of the world. He alleges that this Libel is wholly untrue, and that it is malicious; and, it will be left to you, gentlemen, after a full disclosure of all the facts and circumstances in this case, to decide on the issue between the defendant and the prosecution.

I shall now proceed to read to you the whole publication, that you may be the better enabled to discover the scope and object of the specific charges to which I have adverted.

To the opposite Counsel.—You admit the publication?

Hoffman.—We admit that the *publication* was inserted by the defendant in his paper at the time stated in the indictment; but not that he was the author. You may read it to the jury.

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"The following queries have been sent to the Evening Post, by an anonymous correspondent; but who, it is easy to perceive, from the hand-writing, is a gentleman of the profession, and I presume, one in practice at the Court of Sessions. Of the truth of the charges conveyed by the implied affirmative of the queries, I profess to have but imperfect information; but, really, so much is rumoured abroad, that I think it due to our Court of Criminal Justice, that an investigation should be publicly instituted. It is very obvious, that, if there is just ground for the complaints that are daily heard, it is not only oppressive and unjust upon the citizens who are subjects of the imposition, but, what is of infinitely more consequence, it necessarily renders the Courts themselves, odious in the eyes of the people. In charity, however, to Col. Macomb, we hope he will be able to give the querist such answers as shall show he has proceeded entirely upon misinformation. It would afford us particular satisfaction to make this paper the vehicle of such a pleasing refutation. With these preliminary remarks, we now beg permission to introduce our correspondent to the reader:—

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For the New-York Evening Post.

To Robert Macomb, Esq. Clerk of the Court of General Sessions of the Peace for the City and County of New-York.

Sir,

Notwithstanding there is a statute which very explicitly fixes and regulates the fees of your office, (vide 2d vol. revised laws, page 18,) there seems a deal of mystery always to hang about you in making demands of costs, which no one appears to be capable of penetrating; and which I consider quite incompatible with public justice and the rights of the citizen. I, therefore, take the liberty to call upon you for an explanation on this subject; and I particularly request your answers to the following queries:

1. By what law or rule of Court do you demand and receive eight or ten dollars from every defendant who is acquitted on a trial in Court?

2. By what law or rule of Court do you demand and receive the like sum, on a settlement of certain misdemeanors by the parties, before or after indictment found, as allowed by law?

3. By what law or rule of Court do you, immediately on the adjournment of the Court, every month, demand and receive the sum of six dollars and twenty-five cents from every person, who had become bound, in recognizance, for the appearance of any defendant, when the condition of the recognizance had been performed by the regular appearance of the party, or when the case has been dismissed by the Grand Jury, or discontinued by the party complaining not having appeared to prosecute? Will you be so obliging as to turn us to the law or rule of Court by which this most extraordinary charge is authorized? For really, Sir, it appears to us, that when a citizen, against whom a frivolous or unfounded complaint is preferred, is brought up to the Police Office, and there gives bail to appear in Court and answer to the charge, and in pursuance of his recognizance does appear, but owing to the complaint's being dismissed by the Grand Jury, on hearing the witness, for the prosecution, or, in consequence of their non-appearance, after the lapse of two or three terms; I say, it does appear to me, that such a person should still be compelled to pay six dollars and twenty-five cents costs to the Clerk of the Court, for *lifting the recognizance*, as it is elegantly termed, after the condition of it has been duly performed, *a most flagrant and indeed gross act of injustice.*

4. By what law or rule of Court do you demand and receive the like sum, even from persons, who are bound to appear only as witnesses, and who have, pursuant to the condition of their recognizances, duly appeared, and when those recognizances have never been estreated in open Court?

5. Do you consider yourself as entitled by law to the sum upon every recognizance put into your hands by the Magistrates in the Police Office, or by the Recorder, whether the same be duly estreated or not in open Court?

6. Do you consider yourself authorized by law, at your own will and pleasure out of Court, to estreat any recognizance, or to make use of it as a threat to enforce the payment of any of the foregoing demands?

7. Was it not made a rule of Court some time since, that the Court of Exchequer should collect all fines and forfeitures, and do you not, however, continue to collect them still, in defiance of this salutary rule?

8. By what authority do you write notes at the termination of every Session to certain gentlemen, informing them that they are fined 40 or 50 dollars for non-attendance as jurors, and request that the money should be transmitted to you, although the authority to collect fines is vested exclusively in the Court of Exchequer?

9. Is it true, that in a late case of assault and battery, you undertook to settle the matter for the defendant before the Court commenced, and received your cost, that, however, the party who complained, and who only had the right of making such settlement, not being apprized of it, the prosecution went forward; but, upon a disclosure of all the circumstances to the Court, a *nolle prosequi* was ordered; and, is it true, I ask, that you had the assurance to demand about 17 dollars additional costs from the defendant, which you pretended, accrued in consequence of the prosecution not being stopped?

I have not the slightest wish to deprive you of a single cent of your just and lawful fees, but since the people suffer greatly by demands of the nature above-mentioned, we should be glad to know, whether you have not misconstrued the law, or not carefully examined the fee-bill. Even admitting some of the demands of the nature of those above stated to be legal, I cannot for my life discover how your costs, according to the fee-bill (which is here annexed) can amount to any thing like what you charge.

I have made inquiries on the subject, of gentlemen of the bar, but they say they do not understand it. We have also applied to the District Attorney, who also declares that he knows nothing about the matter, and that he has nothing to do with your fees. From him we have gone to his Honor the Mayor, who gives us no other satisfaction, than telling us, that if there is any thing wrong in the charge, it will be inquired into, on application to the Court while sitting.

Meanwhile, we are threatened with the forfeiture of our recognizances, if we do not call at your office and pay your costs, on those very recognizances, the condition of which we have faithfully performed long ago.

We hope, therefore, Sir, seeing the situation in which we are placed, that you will promptly satisfy us on this subject; for if you can show us any law or rule of Court, sanctioned by law, by which you are authorized to make these exorbitant and extraordinary demands, we shall quietly submit, until we can seek relief from the Legislature.

VOX POPULI."

The counsel having read the publication, rested the prosecution.

Price.—Gentlemen of the jury:—This is a prosecution against William Coleman, the Editor of the Evening Post, for a Libel. In whatever point of view we consider this case. the result is highly interesting, and involves principles of vital importance to the community at large. The defendant is deeply interested, and the official conduct and character of the prosecutor are at stake.

Mr. Coleman, gentlemen, has been an Editor in this city for sixteen years: and has conducted a leading paper during that time, with reputation to himself and with advantage to the community. If, unfortunately, on this occasion, he has singled out Col. Macomb as an object of public reprobation, and has, maliciously, held him up to public odium and reproach; if he has made this publication without good motives and justifiable ends, then, gentlemen, you must pronounce him guilty; he must stand convicted, for the first time, as a Libeller, and ought to receive the reprobation of all honest men.

The duty and situation of an Editor, gentlemen, is peculiarly arduous. The Press was instituted for the noble purpose of promulgating truth and diffusing correct information through the community. Its claims are higher still, and still more imposing. Often has it roused the slumbering energies of man and awakened him to freedom. Often has it unrivetted the chains of tyranny and set captive nations at liberty. But when even among a free people, tenacious of their rights, one of their public servants, regardless of his duty, and unmindful of the awful responsibility of his situation, becomes guilty of malversation in his office, then the Press, faithful to its trust, shall bear the shameful deed to every ear, and every tongue shall disapprove.

Gentlemen, it is not because these charges have been published against the prosecutor; it is not because the publication arraigns the official conduct of one of your public servants, that the defendant is to stand convicted by your verdict.

In this country, the doctrine of the common law which proclaims "the greater the truth, the greater the Libel," has been exploded; and a rule more consonant with the genius of our government has been established by an express statute. The truth of the matter contained in the Libel can now be given in evidence; and should it appear that the defendant was actuated by good motives and justifiable ends, he must be acquitted.

The defence, gentlemen, which we shall interpose, rests on two grounds. We aver, in the first place, and believe it will appear manifest in the progress of this trial, that this publication was not made maliciously. The defendant shrinks not from a public investigation of his conduct. He was on good terms with the prosecutor, and could not have been actuated by any motives of private resentment.

In the second place, we shall endeavour to prove that the charges contained in that publication are true. And here it will not be expected from us, nor does the law require that every minute collateral fact stated should be justified: suffice it to say, that the substance of the material charges, contained in the article which has been read to you, will be abundantly established. We shall prove that Col. Macomb, in a great variety of instances, in his official station, has exacted and taken too much—he has taken more than the law justified. If we make this appear, and if we establish the truth of this publication, whatever may be your sympathies towards the situation of the prosecutor, you must pronounce the defendant not guilty.

I beg of you, gentlemen, to view this prosecution in its true and proper light. The prosecution is not between Col. Macomb and the defendant; but the *people* are arrayed against him, and his and their rights, only, are to be considered by you in the verdict you are to pronounce. The prosecutor, no doubt, is to appear as a witness; and I beg you to consider him, simply, in that capacity.

It may, and no doubt will, be told you, that to acquit the defendant would operate to the ruin of the prosecutor. I think I know you too well to be influenced by considerations of expediency; or, that you will be seduced from the path of your duty by the imposing front which this prosecution assumes. When there has been a shameful violation of duty, and a high public officer, regardless of the most sacred obligations, has taken advantage of his situation to oppress the people, his delinquency ought to be pourtrayed in vivid colours, and he deserves to be held up to public execration.

I think, gentlemen, I am warranted in saying, that before this prosecution is terminated, you will be convinced that its commencement by Col. Macomb was, at least,

indiscreet; and, without regard to the feelings of either of the parties interested, I know you will administer ample justice.

Ogden here offered to prove that the publication, charged as a Libel, was written by John Rodman, the former District Attorney of this city and county, who sent it to the defendant for insertion in his paper.

Gardenier objected to the evidence, on the ground, that even if admitted, it could form no justification.

The opposite counsel, however, contended that such evidence was proper for the purpose of showing the want of malice. The charges on which the indictment is founded coming from a high official source—from one who must have been supposed cognizant of the facts, bore, in some measure, the sanction of authority and the stamp of truth. It was for the purpose, not only of proving the truth of the charges, but of showing the want of malice, that the evidence was offered.

The court decided that the evidence offered, was admissible for the purpose stated by the defendant's counsel.

Richard Hatfield, on being sworn, proved the manuscript produced to be the hand writing of Rodman, who was District Attorney during the month of September last.

Ogden here proceeded to read the manuscript and point out several verbal alterations made by the defendant in the original manuscript, by which it appeared that the defendant, by several of these alterations, had softened the asperity of divers expressions used by the said Rodman: but it appeared further, that the matter complained of in the indictment, and stated therein as the second specific charge, and in the publication as the ninth interrogatory, above set forth, was in the hand writing of the defendant.

Isaac Tucker, a witness for the defendant, on being sworn, testified, that in August last, the wife of the witness was charged with an assault and battery on a little boy, and bound over at the Police. He employed John A. Graham to see it settled; and, during the term, the witness with his counsel called on Macomb, who told him that if he would pay $6,,25, he would give him a discharge, and he might go home about his business. The witness paid the money. During that term no bill was found against his wife, to the knowledge of the witness.

He was summoned as a juror in the Court of Sessions for the next term, and while sitting in Court he heard the name of his wife called. The witness called on Rodman, and related to him the circumstances of the former payment to Macomb; but Rodman said Macomb had no right to settle it, and advised the witness to submit, and make an application to the Court before sentence was passed, on affidavit, stating the circumstances of the case. The witness pleaded guilty, and on the last Friday of the term was fined $10; but, on the following day, on a representation made by his counsel, the witness found the fine was reduced to six cents.

On the same day the witness called on Col. Macomb, who told the witness he must pay $6,,31 more. The witness referred the clerk to the former payment, and asked him if he had any thing more to pay besides the six cents. The Clerk told the witness that he had been highly favored, for if he had had his deserts, he would have been fined $50 and imprisoned six months. The witness reluctantly paid the money.

On the Monday following, one of the marshals called on the witness with a bill of $22,,50, consisting, as the marshal said, of the charges of two Courts and the fine of $10. The marshal was told by the witness that he had a bill against Col. Macomb, and refused payment. Afterwards the witness called on his Honor the Mayor, who wrote a letter to Col Macomb, which the witness delivered to him, and obtained a receipt from the Clerk, without making a further payment.

A few days after, the witness, in a conversation with Rodman, then District Attorney, in presence of Josiah Hedden, one of the Police Magistrates, was informed by Rodman, that the affair of which the witness complained against Col. Macomb, was an assumption of his own, and that he, Rodman, would make Macomb pay back the money. On an inquiry by Hoffman, the witness further testified, that he became the security for his wife, and attended Court for her during the August term, and her name was not called to his knowledge.

On the cross-examination of this witness, he further stated, that between the terms of August and September, as the witness was informed, the complainant, in the prosecution against the wife of the witness, complained to the Police, and in September had her indicted.

Col. Macomb inquired of the witness, whether at the time he paid the $6,,31 he, the Clerk, did not tell the witness that it was a cruel assault committed on a little boy by

the wife, for which *she* might have been fined $50. The witness answered that the words were spoken concerning *himself*, and were, in effect, as he had before stated.

Jacob Radcliff, one of the members of the Court, was here called from the bench as a witness on behalf of the defendant, and on being sworn, testified that the present practice of the Court of Sessions in making up their sentences is, that in the afternoon of the last Friday of each term, the members of the Court meet for that purpose. A calendar of the convictions is furnished by the Clerk, on which he notes the sentences to be passed—if any alteration be made by the Court before finally passing sentence, it is also made by the Clerk on said calendar.

In the case of Ruth Tucker, spoken of by the last witness, it appeared from his minutes, that this was a conviction by confession for an assault and battery, and no explanation having been made to the Court of the circumstances, a fine of $10 was agreed to be imposed; but the next day, on a representation made to the Court after it had convened, the fine was reduced to six cents.

On the cross-examination of this witness, it appeared, that, generally on the Saturday morning, in which the sentences of the Court are passed, the Clerk, who previously ascertains from the Court what the sentence is to be, comes into Court with the warrants of commitment ready; but, on a further inquiry by the counsel for the defendant, the witness stated that he did not know whether such warrants were actually filled up by the clerk, in cases of misdemeanors, before his coming into Court. The witness was asked by the counsel for the defendant, whether he recollected the letter sent by him to Macomb, concerning the costs spoken of by Mr. Tucker? To which the witness replied, that since he heard the testimony of Tucker, he remembered that such a letter was sent; and, on a further inquiry of the witness, by the counsel, concerning the contents of the letter, he answered, that he did not recollect them.

John B. Thorp, on being sworn on behalf of the defendant, testified, that in the summer of 1815, he was the security for William F. Bradbury, charged with theft, the charge (on examination not amounting to felony,) was settled in the Police and went no further. The witness afterwards went out of the city, and, on his return, received several notices in succession from Macomb, requesting him to pay the costs, or the recognizance would be forfeited. The witness called on the Clerk, who informed him that the time had run out, and that the recognizance ought to have been taken up before. On asking Macomb what he, the witness, must pay, he was told $12; but, on remonstrating, he agreed to accept $10: but whether he, the witness, took a receipt or not, he does not remember.

On his cross-examination, the witness stated that he thought Bradbury was bound in August for his appearance in the Sessions in September, and that in November following the witness made the payment to Macomb. As it was a private dispute touching the right of property, a settlement was made in the Police Office; but the witness did not inform Macomb that it was so settled.

Thomas Bennet and George Arnold were here called and sworn as witnesses on behalf of the defendant. Arnold testified that there was a complaint for an assault and battery, entered against him in the Police, and a warrant was issued, and a man by the name of White became security. He, the witness, afterward went to the Police, and was there informed that it was all settled. There was another complaint for a similar offence, entered either by the same prosecutor, or some other person, but in which of them, did not appear; and Thomas Bennett became security for the appearance of the witness. At the August term following, the witness was acquitted, no person appearing to prosecute. He was called on by Mr. Wiley the Deputy Clerk for the costs, amounting to $8,,43. The witness afterwards paid to Wiley $6,,50, and, by his direction, $2 to Mr. Skaats the Crier of the Court, for him.

Receiving information from Bennet that he, as surety, had paid $12, for him, the witness, he called on Mr. Wiley on the business, and for the purpose of getting it back, who told him that Macomb was then out of town. The witness, afterwards, called at the Clerk's office, and found Wiley and Macomb in the office together. Wiley observed to the Clerk, "Here is the man who has come to see about that money." Whereupon Macomb said to the witness, "Oh! you have come to pay that bill." The witness replied that it had then, already, been paid twice. Macomb inquired of the witness, whether he had employed a lawyer, which being answered in the negative, Macomb said that the witness had saved a good deal by that. Whereupon after turning over his book, Macomb said

hat it was all right; and that Mr. Wiley ad received no more than the legal fees; nd, other persons coming into the office, Macomb, very politely, bid the witness a ood morning. Nothing was ever refunded the witness, and he received no other conolation by his visit to the Clerk, than that of eing told by him, that he had come off well ompared with the opposite party, who, havng forfeited the recognizance, would be bliged to pay $100.

Thomas Bennet testified that he was one f the pilot committee, and in August, 1816, ecame security for Arnold, and heard nohing of the affair until sometime in September, hen he received a notice from the Clerk's ffice to come and pay a bill of costs. The itness called on Mr. Wiley, the Deputy Clerk, ho informed him that the costs were $12,,12, nd was very urgent for the payment, and id it must be paid in an hour. The witess told the Deputy that the prosecution ad been settled and costs had been paid; t the Deputy informed him that the above m was due and must be paid. Not having e money, he was allowed one hour to go nd borrow it. The witness borrowed it and id it to the Deputy.

The witness, before the payment, had en told that he was entitled to a receipt, nd when he called on Wiley, the witness st inquired of him if he would take bank lls in payment, and being answered in the firmative, the witness offered him the moy and required a receipt. The Deputy, at st, refused to give a receipt, alleging that it as contrary to the practice in the office. hereupon the witness was about departing, hen he was called back, and the Deputy reived the money and gave a receipt, which ars date on the 19th of September, 1816, appeared on its production. Afterwards e witness called on the Deputy Clerk with r. Arnold, who told him that the money d been paid by him before the receipt was ven. Wiley acknowledged it had been paid, nd that one or other of the sums ought to be funded, and that if he had the money he ould repay it then; but that Macomb ould be back in four days, when he would ay back the money.

Here Arnold testified, that when he called n Macomb, in presence of the Deputy, as beore related in the testimony of the witness, get the money refunded, he had Bennet's ceipt, which he exhibited, and Macomb, stead of paying him, only said, it was all right, Mr. Wiley had done right, and wished him good morning, as before mentioned.

Bernard Kennedy testified, that Timothy Keegin and John Cummings were arrested, brought to the Police, and bound over for an assault and battery committed on a child, and the witness, Kennedy, became their security. The parties settled the matter in the Police, and paid $1,,50 costs. Rodman, then District Attorney, was present, and told them it must be settled at his office. They accordingly went to Rodman's office, and paid fifty cents for a letter to Macomb, to whom they went and paid $6 each; and, afterwards, receiving a notice from the Clerk's office, requesting them to come and pay the costs, they called on Mr. Wiley and paid him the additional sum of $6,,25.

Dr. Richard Walker testified, that having been called on by Cummings and Keegin, two poor men, to assist them as a friend in settling the affair for which they had been bound over; he went with them to the Police Office, at nine o'clock in the morning of the first day of Court, to have the matter settled before the opening of the Court; and found that the papers had not been sent up to the Court. The settlement then took place, as mentioned by the last witness.

Afterwards the witness was applied to by the parties, and on their representation went with them to Macomb's office, and demanded of him why they had been charged with costs in a matter which had never come before the Court; alleging that he had no right to receive any costs in such case. Macomb said that it was all right, to which the witness replied, that it was not; and added, that he was determined to see that justice was done to these poor men. Whereupon Macomb said, that if they would call on him after Court, it should be arranged. In about a month afwards, on a further representation made to the witness by Cummings—that he had received another notice from the Clerk's office, requiring him to pay the costs, or he would be sued for $200, the witness went with him to the clerk's office, and in warmth demanded of Macomb, why Cummings was called on for costs he had already paid twice; alleging further, that he, Macomb, had promised to refund the money already wrongfully received. Whereupon Macomb looked over his books and found the case, but no money was credited for costs. He then took his pen and marked it as paid, saying it was a mistake; but the witness told him that was not sufficient:

he must refund the money, as he had promised to do. Macomb replied that he was busy, and they must call again; but the money had never been refunded, to the knowledge of the witness.

On his cross-examination, by Macomb, Dr. Walker stated further, that although he could not say that Macomb had ever actually promised to pay back the money, it was the understanding of the witness that Macomb, in promising *to arrange it*, promised to pay it back.

Charles Ridebach testified, that about the 30th of October, 1815, three young men, named Maine, Osborne and Carlisle, were confined in bridewell on a charge of felony. Osborne was the son of a poor woman; and, having turned State's evidence, the witness, at her solicitation, called on Macomb, at his office in Courtlandt-street, to ascertain and settle the amount of the costs; having received a letter to do so. Macomb informed him, that the costs amounted to $15; when the witness stated to the Clerk the peculiar situation of the mother, and the difficulty to which she would be subjected in paying the bill. Macomb would make no abatement, and said the money must be paid. The witness then offered the money and required a receipt: but the Clerk said that his book was a sufficient receipt. Whereupon the witness refused to pay the costs without a receipt: and was about leaving the office, when Macomb called him back, and gave a receipt on receiving the money.

Afterwards, the witness being dissatisfied, and being informed that he had paid Macomb $11 too much, called on Mr. Maxwell and related to him the affair, who said, that the witness had acted foolishly in paying Macomb any thing.

The witness, afterwards, called frequently at the Clerk's office, and at length found him, and after much conversation, in which the witness informed Macomb he had come to get back $11 wrongfully paid him, Macomb told him if he would call on him in the Sessions, he would settle with him. He called accordingly, but then Macomb said that this was not a proper place or time to transact such business. The witness replied, that it was; and he would call on a man any where, who had wronged or cheated him out of money; and that, if he had his deserts, he would be sent to the State Prison. The Clerk said he had not then the money; but the witness was very urgent in his demands, and finally threatened, if the Clerk did not instantly refund the money, he would immediately make a representation to the Court. Whereupon Macomb told him, if he would hold his tongue, he would pay him, and drew a check on the bank for $11, and delivered it to the witness, who departed.

William Messerve, on being sworn, testified, that sometime during the last fall, he was bound in a recognizance of $1000, being, as was said, for murder; but he never heard any more of it: and sometime afterwards he received a notice from the Clerk's office to come and pay the costs, or the recognizance would be forfeited. He called on the Deputy Clerk, at the office, who told him the costs were $16. The witness refused to pay that sum, and said he would call on Macomb. He saw Macomb at Harlaem, and told him that he had been charged $16. Macomb told him to call at his office, when he received $8, and when asked for a receipt, said, that his book was receipt enough: and that he so made the bill lower because he was acquainted with the family of the witness.

John G. Bogert, on being sworn, stated, that he is a counsellor at law in this city. That sometime in May, 1816, his son was indicted for an assault and battery, to which he pleaded guilty, and was fined $25. An officer called on the witness for the fine, and $10 or $11 costs, which costs the witness refused to pay, and at length it was relinquished.

William Sanford, testified that he had a son bound over in the Police for his appearance, but no proceedings were had. Afterwards the witness received a notice from the Clerk's office, requiring payment of the costs. The witness called on the Clerk, who told him the costs were $15, and alleged as a reason why they were so much, that the warrant was issued against two of the witness's sons: whereas the other son at that time, and before the issuing of the warrant, was at sea. The witness being dissatisfied at the charge, called on a lawyer, who advised him that the bill was too much, of which he informed Macomb without mentioning the lawyer's name. Macomb said that it was some petty lawyer who wanted to run the witness into costs. The witness paid it, and took no receipt.

Isaac A. Anderson testified, that a year before last fall, two of his sons, John and Isaac, were bound over at the Police, for an assault and battery, and the witness became security. The second or third term after the affair was settled, and no bill was found

by the grand jury. The witness was notified from the Clerk's office, to come and pay costs, and paid to the Clerk, in two payments, either $16,,50 or $17,,50.

Thomas Phœnix, a counsellor at law in this city, testified, that sometime in the Spring of 1816, a man named John Smith, on a malicious charge for a felony, was bound over at the Police, for his appearance at the Sessions. The witness became bail. No prosecutor appeared against him, and no bill was found by the Grand Jury. The witness applied to the Court for the discharge of Smith, which was granted; and Smith, afterwards called on the witness with a notice from the Clerk's office, to come and pay the costs. The witness advised him, for certain reasons, to pay the bill and get a receipt, which was done. The costs paid by Smith were $9,,50, as appeared by the receipt bearing date 1st May, 1816.

James Stoughton, a counsellor at law, testified, that he was bound over in the Sessions in the fall of 1815, to keep the peace one year. He applied to the Recorder to be discharged from his recognizance; and, in the March following, the order was granted for that purpose. During that month a presentment was made to the Grand Jury, against the witness, founded on the act to prevent duelling, but no bill was found. He was afterwards called on by Macomb for the costs, and paid him $10,,50.

The witness recollects a case in which he was concerned as counsel, in September, 1816, wherein the captain and mate of a vessel having been indicted for an assault and battery, were jointly tried in the Court of Sessions and acquitted. Macomb demanded and received from them $14,,50.

Phœnix, on being again called, stated, that he now recollects a case in which two persons for whom he was concerned, were indicted some time ago in the Court of Sessions, and tried and acquitted the same term. The charge against them by the Clerk was either $17,,50 or $18,50—which, the witness does not remember.

It appeared from the testimony of Peter Van Alen, in connexion with the explanation of his testimony, by his Honor the Mayor from the bench, that in February term, 1816, the witness and his son John were indicted, tried and convicted of an assault and battery committed on a woman. There were two separate indictments; but on the trial, by consent, the testimony adduced on the traverse of the first indictment, was applied to the second. The defendants were fined $25 dollars each; and Van Alen testified that the fine of both, including the costs against both, amounted to $82,,50, which was paid by the witness to the Clerk. (See vol. 1. p. 31.)

From the testimony of Thomas Mercein, it appeared that the witness paid the Clerk of the Sessions as surety for the appearance of a Mrs. Smith, $6,,25, as a witness; she was also bound over as a principal.

Mordecai Homan testified, that in July, 1816, at the complaint of George Ferris, Henry Hughes was bound over at the Police, for an assault and battery, and J. B. Thorp became security; but nothing further was done with it, and the witness paid to Macomb for the costs against Hughes, $10,,25.

From the testimony of William Harrison, it appeared that, about a year ago, his son Edward P. was brought to the Police for an assault and battery. He was indicted in September; but, before the trial, the prosecuting party agreed to make it up, if the witness would pay the costs. He called on Mr. Wiley, the Deputy Clerk, who referred him to Col. Macomb, to whom the witness paid $10,,25 for the costs. As the witness was going out of Court he met a friend, to whom he observed, costs had risen.

David Haight testified, that in the Spring of 1815, one Jonathan Haviland was indicted in the Sessions for a forgery. The witness and another person became bound in a recognizance for the appearance, at the solicitation of Haviland's friends, who lived in the country. He absconded; and in April the witness and the other surety were called on by Macomb, to pay the amount of the recognizance. He was extremely urgent that it should be paid then, alleging as a reason, that the Court of Exchequer was to sit in this city in the May following, when it would be necessary for him to make his returns, and that if it was not paid, the recognizance would be estreated into that Court. The witness and his co-surety, paid the sum of $1000 to Macomb, and took his receipt, bearing date April 17, 1815; which receipt was produced in evidence by the witness.

From the testimony of Isaac Van Hook, a counsellor at law in this city, it appeared, that William Wheaton was the co-surety with Haight for Haviland. After the money was paid to Macomb, as before related, the witness, by the request of the friends of Havi-

land, drew up a petition to the Court of Exchequer, and Platt, the Judge, granted relief.

George B. Raymond, the keeper of bridewell, testified, that in a great variety of instances, where defendants had been sentenced to bridewell for misdemeanors, on the expiration of their imprisonment, Macomb had exacted and received fees from them, and in some cases had received the amount of fines imposed on them.

Gardenier said, he must confess, from the situation of this cause, and from the singular manner in which this defence had been conducted, he knew not what to do. He was at a loss; and called on the Court for direction and advice. Where is the inquiry to stop? Had the defendant presented us with one or two cases, definitely and distinctly marked, it would have been in our power and we might have gone into a minute investigation, and have justified the charges, alleged to be illegal. But the defendant has here called on a host of witnesses, and has proved that the prosecutor has received from them divers sums of money, at divers times.

In this stage of the prosecution, therefore, he thought it proper to submit to the Court, whether it was not incumbent on the defendant, who stands here, in effect, the accusing party, to prove, in addition, the excess of costs which the prosecutor has received in each specific case presented by his testimony. In other words, whether the *onus probandi* does not lay on his side? In his view of the subject, unless the defendant proves this excess, and shows that in each case the prosecutor has received more than by law he was entitled to receive, the testimony is incomplete, and ought to go for nothing. It lies on the Libeller to show the correctness of the charges he has made against the prosecutor.

Hoffman said, he must beg leave to dissent from the position taken by the opposite counsel. He should contend, that having established that the Clerk had, in divers instances, received sums of money for fees, which no law of the state authorizes, the defendant had shown sufficient. The weight of proof now lies on the side of the prosecutor, and it is incumbent on him to show the legality of the charges.

No public officer in this community has a right to receive money *colore officii*. It does not lay in his mouth to say, that our proof is deficient, after it has been established that he has received fees from persons acquitted, or not even indicted—fees not allowable by law, and which, in various instances, he has returned. We shall strenuously contend, in this cause, for a principle as consonant with reason as with the most refined morality. *No man shall be punished for establishing his own innocence* How monstrous—how repugnant to the moral feelings of mankind, that a man discharged from a criminal Court, into which he had not come voluntarily, should, when his innocence is manifested, be amerced with costs!

I know, said the counsel, the whole history of the different statutes concerning costs in criminal cases, for while in the Legislature I exerted my feeble abilities to subvert a practice which is manifestly a disgrace to our courts of criminal jurisdiction in this city. In the year 1787, the first fee-bill, drafted by Varick and Jones, was passed. No provision was here made for the payment of costs by a defendant in a criminal prosecution on recognizance, except for services rendered him at his request.* In the year 1801, the laws underwent a revision by their Honors Judge Kent and the present Mayor. The fee-bill was reported by them as it stood originally, but by some means the provision in question was superadded by the Legislature, subjecting the defendant to the extreme hardship of paying costs.† Thus the law stood until the revision took place in the year 1813, when the provision in question was expunged, and the law, since that time, in this respect, stands on the same ground which it did originally. By what law, then—by what authority does a Clerk presume to receive fees from a defendant? We shall, on this occasion, assume the bold ground, that the prosecutor has no right by law to receive any fees from a defendant, on his acquittal by verdict, or otherwise, in any case whatsoever.

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* "And in all cases of crimes and misdemeanors, where the service is done at the request of the defendant, the Clerk shall be allowed and may take the following fees of the defendant.."

Laws of New-York, revised by Jones and Varick, in 1789, *vol.* 2, *p.* 429.

† The following is the section of the statute introduced into the revision of the laws, in the year 1801. We understand the bill was reported by Judges Kent and Radcliff, without this clause; but, in passing through the Senate, the clause was added by one of the Senators.

"And no person being bound by recognizance to appear and answer, or indicted and fined either in the Supreme Court, or any Court of Oyer and Terminer and Gaol Delivery, or General Sessions of the Peace, shall be discharged, until such person shall have paid the fees to the Clerks of the said Courts respectively." (2. vol. R. L. of 1801, p. 33.)

His Honor Judge Van Ness observed, that with regard to the question raised by the counsel for the defendant, whether the *onus probandi* lay on his side, or that of the prosecutor, he did not conceive that this could be made a question, at the present stage of the prosecution.

As to what had been said by the counsel for the defendant, relative to the legal right of charging a person with costs, who had been acquitted in the Court of Sessions, his Honor said, that whatever may be the practice in this city, since the last revision of the laws, he did not know that it had been the practice of any Clerk of a criminal Court, in any other part of the State.

At the present stage of the prosecution, perhaps the best course to be pursued was, to have the evidence closed on the part of the defendant, and then that the prosecutor should adduce any further testimony he might have.

As the defendant, for the purpose of justifying the charges contained in this publication, had produced a number of specific cases, wherein Col. Macomb had demanded and received costs, which the defendant alleges, and has endeavoured to show, were illegal, his Honor, though he did not wish to be understood as directing the counsel what course to pursue, suggested that the services rendered in each specific case, might be shown on the part of Col. Macomb, and then that the charge or charges, so made, might be compared with the fee-bill; or, that other explanations might be made on his behalf, for the purpose of repelling the charge of having taken illegal fees.

Raymond here produced twelve commitments against defendants who had been sentenced to bridewell for misdemeanors, and stated, that it was the usual practice of Macomb, to receive the fines and costs from such defendants, on their discharge. These costs amounted, on an average, to about $10,,50, in each.

Hoffman here read from the statute, (2. vol. R. L. p. 506 and 7,) to show that it was the duty of the Clerk to return the recognizance and record of the default, into the Court of Exchequer.

In the case of Samuel Douglass, contained in the documentary evidence produced by Raymond, and also by his testimony, it appeared that the defendant, Douglas, had been convicted in the Sessions for a misdemeanor, and sentenced to pay a fine of $20. It had been the practice in bridewell whenever prisoners were confined there, for them to deliver the keeper their money or other effects, for safe keeping, until a liberation took place. Douglas, at the time he was committed, delivered $10 to the witness to keep. Macomb afterwards came to the prison, and understanding from the witness that the defendant had only $10, he, Macomb, offered to discharge the prisoner, on his paying that sum. The witness went with Macomb to the room where the prisoner was confined, and obtained his consent to pay the $10 to the Clerk, who immediately wrote a discharge, and in a few days afterwards brought the witness an unconditional pardon for the prisoner.

Gardenier hereupon stated to the Court, that from the singular course which had been taken in the defence, he considered it his duty, as counsel, on behalf of the prosecution, to request of the Court an adjournment. The counsel said that he had been but recently engaged in the cause: a mass of testimony had been produced by the defendant, for the purpose of establishing the truth of the charges contained in this Libel. The official conduct of the prosecutor, for a series of years, was impeached; and the Court would perceive, that in this instance, where a great variety of facts had been adduced to establish a general charge of malversation in office, the prosecutor could not, possibly, come prepared with testimony to repel such charges.

His Honor Judge Van Ness said, that he was disposed, in this case, to grant every reasonable indulgence; but that he did not see how the Court could, consistently, grant an adjournment. What would be done with the jury? It would not do for them to separate; the defendant had brought a great number of witnesses, now attending, and was ready on his part. On the whole, his Honor said, that as the Court and jury were somewhat exhausted, and as it would be perhaps a considerable time before the trial was finished, he thought proper, on this occasion, to grant a recess. Whereupon the Sheriff was directed by the Court to provide refreshments for the jury in a convenient room in the hall, and a recess took place for one hour.

When the Court and jury met, Gardenier commenced a formal opening to the jury of the testimony.

On an objection raised by Emmet against the propriety of a further opening to the jury on behalf of the prosecution, Judge Van Ness

said that it was usual and proper for counsel in the progress of a cause, when about to introduce new testimony, the necessity of which might not have been foreseen at the time of the former opening, to open the evidence, briefly, to the jury.

The counsel then proceeded to state to the jury, that a great number of witnesses having been introduced by the defendant, to establish a variety of independent facts touching the official conduct of the prosecutor, for the purpose of justifying the charges contained in the libel, it was incumbent on him to repel those charges. The jury, however, would perceive the extreme difficulty of meeting each specific fact relied on by the opposite counsel, with positive proof or satisfactory explanations. The whole official life of the prosecutor was brought in question; and, from the very nature of the affair, it became necessary to recur to documentary proofs, and the records of the Court, for a number of years past. From the unexpected testimony relied on by the defendant, and the short recess granted for preparation, the counsel feared that the testimony would not be so compiete as it, otherwise, might have been. In the first place—

He should, however, endeavour to explain the most prominent charges, by exhibiting the records and minutes of the Court of Sessions to the jury; secondly, prove that the costs charged by the prosecutor were conformable to the uniform practice of the Court, to those of preceding Clerks, and to approved bills taxed by the Judges of this Court and of the Supreme Court; and, thirdly, show the correctness, in general, of the prosecutor's official conduct.

William Wiley was here sworn as a witness on behalf of the prosecution, and a book of minutes kept by the Clerk of the Court of Sessions was produced and exhibited to him, and he was asked, whether that was the book of minutes, and answering in the affirmative, he was further asked, whether it was the book of *original minutes* taken in Court. He answered, that the book exhibited was not taken in Court, but was engrossed from the rough minutes, taken in court, according to the usual practice. He was then asked by Ogden, whether the book offered was engrossed before this indictment was found. He answered, that it was his impression; and he believed it was.

Emmet and Hoffman objected to the introduction of the book, as evidence, contending that the original minutes taken down in Court, being the highest evidence, should be produced. The counsel took a distinction between a case where a fact was to be established by the minutes, wherein the interest of the Clerk could not be affected, and the present case. They said, that Macomb, in this prosecution stood, in truth, as the party accused; and that he ought not to be permitted, in this manner, to furnish written evidence for himself.

Gardenier contra.

His Honor Judge Van Ness said, that a great variety of specific charges had been brought against Col. Macomb, in his official capacity as Clerk, and the defendant had called on witnesses to fortify these charges. It would be extremely difficult, if not impossible, for Col. Macomb to explain those transactions, of which the witnesses for the defendant had spoken—transactions which occurred for several years past, unless he were allowed to recur to his book of minutes. Besides, Col. Macomb, in his official duties, acted under oath, and is presumed to have done his duty. Here it is proved that the practice of the office is to transcribe from the rough minutes taken in Court, into a book called the book of minutes, which, to a common intent, may be considered the original minutes.

As the Clerk is presumed to do his duty, and as it appears that this book was engrossed before the indictment in this case was found, it is good evidence, *prima facie*, of the facts therein contained.

Here Gardenier recurred to the case of Ruth Tucker, in the minutes, by which it appeared, that on the 6th of September, 1816, "the defendant being arraigned, pleaded not guilty;" on the 7th, "the defendant withdrew her plea, and pleaded guilty;"—14th, "Convicted, by *verdict*,* of an assault and battery, and fined $10 and costs.

Gardenier here offered in evidence two bills of costs; the one taxed by his Honor the present Mayor and the Recorder, on the 2d of December, 1816, in the case of Peter Young, tried in the Court of Sessions, and the other in the case of Edward Ferris and others, taxed on the 9th day of September, 1811, by the Hon. De Witt Clinton, then Mayor of New-York.

Emmet said that he totally objected to the evidence offered; and he made the objection, and should insist on it as much from delica-

* This is manifestly a mistake in the minutes.

cy towards his superiors, as with any other view. The counsel had hoped that Col. Macomb on this occasion, instead of sheltering himself behind precedent, would have been prepared to repel these charges on legal grounds.

The counsel contended, that neither the Mayor nor Recorder were taxing Judges, and that they had no authority by law to give their sanction to any bill of costs whatsoever in a criminal Court. The evidence offered was, therefore, inadmissable, and ought not to be received.

It should besides be recollected, and the counsel said that he wished it to be distinctly understood, that the defendant, on this occasion, did not think it necessary in defending himself to impute any corrupt motive whatever to Col. Macomb, in the discharge of his official duties. The ground which we assume, said the counsel, in our defence, is, that the prosecutor has taken *illegal fees*, and has made charges, in his official capacity, not warranted by law. Shall the prosecutor, therefore, said the counsel, be allowed to defend his conduct by the errors of others; and when *we* ground ourselves on the law, shall *he* be permitted to justify himself by the practice of his predecessors, and by taxed bills of the judges?

Gardenier, hereupon, read several parts of the Libel, and contended, that as the prosecutor had been charged in the publication, in divers parts, with having acted contrary to the rules and practice of the Court, surely, he ought not now to be precluded from showing that he acted in conformity thereto. The Libel, said the counsel, contains a strong insinuation, that the costs charged by the prosecutor were not only illegal, but were a new invention and device contrived by him for his own emolument, and that neither the rules or practice of the Court justified such charges.

The counsel further argued, that all Courts had, and must, necessarily, have a right of fixing and ascertaining the fees to be charged by their respective officers. It is a necessary prerogative of a Court of justice, and results from the very nature of its organization.

Emmet in reply said, that if it were true that charges such as had been fastened on the prosecutor in this investigation, had been tolerated by every clerk in the Court of Sessions; if so flagrant an abuse of justice had been suffered to grow up into a precedent; then the conduct of the defendant was highly meritorious, and he deserved the thanks of the community at large, for having made this a subject of public inquiry. It is high time, said the counsel, that the people should know whether one of their public servants, standing in a high official situation—a station which, above all others, affords an opportunity of doing wrong, when not restrained by law, or by an uncorrupted integrity, should place himself above the law.

The opposite counsel, he apprehended, had totally mistaken the ground assumed by the defendant. We stand forward boldly, on this occasion, said the counsel, to inquire, *What is the law on this subject?* We avow that we are unwilling that precedent should govern the law; nor do we wish to bring in question the official conduct of third persons: and we most solemnly protest against an inquiry into the practice of the several Clerks in our Criminal Courts for twenty years past.

We call on the gentleman, to prove, *by the law alone*, that the charges he has made, as established by our testimony, are correct.

His Honor the Mayor, in pronouncing the decision of the Court, observed, that it was true no taxed bill fixed the legal rule; but the publication, in several of the inquiries which it contained, conveyed the idea that the prosecutor had received costs from others which the rules or orders of the Court did not authorize. Another general charge in the publication was, that he had received illegal fees. The evidence, produced by the defendant, was intended to justify, and applied to, both charges. So far, therefore, as the prosecutor might be prepared to show that his charges had been conformable to the rules or practice of the court, established at a time anterior to the publication, on which the indictment is founded, his Honor thought, the evidence was proper.

Gardenier here produced the bills of costs in the cases of Peter Young and Edward Ferris and others, and read the items from the bill in the former case as follow:

First day.

Order that the defendant be called,	$0,,20
Crier ringing the bell, . . .	0,,09
Crier calling defendant and Clerk entering appearance,	0,,18 1-2
Order that recognizance be respited,	0,,20
Clerk respiting recognizance,	0,,06
	$0,,73 1-2

Second day.

Order that defendant be called,	$0,,20
Crier calling defendant, . . .	0,,06
Clerk entering his appearance,	0,,12 1-2
Order that recognizance be respited,	0,,20
Respiting same, ...	0,,06
	$0,,64 1-2

Here there was a charge of $0,,64 for nine successive days, amounting to . $5,,80 1-2

For the last day the following charges appeared in the bill:

Clerk reading and filing affidavit of complainant with return of the Grand Jury thereon,	0,,12 1-2
Order that defendant be discharged, on payment of costs, .	0,,20
Order that defendant be called,	0,,20
Crier calling defendant, . . .	0,,06
Order that surety be called to bring forth the defendant,	0,,20
Crier calling surety, ...	0,,06
Order that warrant issue against defendant, ...	0,,20
Order that defendant be discharged,	0,,20
	$1,,24 1-2

First day, . .	$0,,73 1-2
Second do. .	0,,64 1-2
Nine successive do.	5,,80 1-2
Last do. . . .	1,,24 1-2—$8,,43

The following taxation appeared on the bill:

We tax this bill at eight dollars and forty-three cents. *Dec.* 2, 1816.

JACOB RADCLIFF, *Mayor.*
RICHARD RIKER, *Recorder.*

In the case of Edward Ferris and others, the same specification of charges was made: and the bill was taxed by his Honor De Witt Clinton on the 9th day of September, 1811. It appeared that the taxation of both bills was resisted.*

By the above bills it appeared that on a recognizance, on the first day in the term, after the recognizance was entered, a charge of $0,,73 1-2 was made, and for every succeeding day, in each day, until the recognizance was discharged, $0,,64, and the two principal charges were the *order* that defendant be called, and the *order* that his recognizance be respited.

Ruth Tucker was here called as a witness on behalf of the defendant; who on being sworn testified, that she never appeared in the Court of Sessions to answer any charge; but that being bound for her appearance in that court in August, 1816, John A. Graham was employed on her behalf.

William Van Hook was here introduced and sworn as a witness on behalf of the prosecution; who, on being asked concerning the practice of the former Clerks in their charges, testified that he was unacquainted with the practice in this particular: it had

* We have thought proper, for the purpose of elucidating, by all the means in our power, consistently with our limits, a subject so important as the present, and to ascertain what the practice has been, to search the official records in this city, from the year 1732, to the present time. We have proceeded through the successive Clerkships of Augustus Van Cortlandt, Robert Benson, Tunis Wortman, and Robert Morris, Clerks of the Sessions, and William Coleman, the present defendant, Clerk of the Oyer and Terminer, and John W. Wyman, Edward W. Laight, and Robert Macomb, Clerks of the Court of Oyer and Terminer, and of the Sessions. The result of this research has been, that it appears from the books of minutes—from the records, recognizances, and other official documents, that it has been the uniform practice of these several Clerks, to make the same charges for the same services, (such as continuing the recognizances from day to day, and sometimes, as in the old books, from morning till afternoon) as are contained in the bills above-mentioned. It is true, that anterior to the revolution, and until the revision of the laws in 1801, the fees allowed to the Clerks, for the same services, were less than at the present time, but the several items specified in the bills are the same. For example: the *orders* mentioned in the bills we have examined, made by the several Clerks, previous to the Clerkship of Mr. Wyman, were 9d. instead of 20 cents, as contained in the above bill.

It also appears, by a recurrence to the documents in the office of the Clerk of the Court of Exchequer, the Judge of which is the junior Judge of the Supreme Court; that since the commencement of the Clerkship of the last named gentleman, bills containing the same specification of charges as those contained in the bills given in evidence, as above, have been uniformly audited and allowed by the Judges of that Court.

In cases where a recognizance has been forfeited and ordered to be estreated, bills, made out by the Clerks of the Courts of Sessions, in which the recognizance has lain for twelve days in Court, or a term, on the twelfth day amount to 5 dolls. 66 cts. independent of the Crier's fees, which, at 24 cts. a day, amount in twelve days to 2 dolls. 88 cts. Add which to 5 dolls. 66 cts. and the amount is 8 dolls. 54 cts.

We request our readers, however, to understand that the former practice, in relation to the allowance of charges to Clerks on recognizance, either in the Sessions or Court of Exchequer, has no application to the great question respecting *the right of the people in charging a defendant with costs.* We cannot subscribe to the doctrine, (whatever may have been the practice), that a defendant, acquitted from a criminal charge by verdict, or, for want of prosecution, should be subjected to the payment of costs. Our limits will not allow a discussion; but we will lay down what we believe to be the true rule on the subject—a rule supported by analogy, by sound reason, and, as we believe, consonant with the opinion of the ablest jurists in our country. This rule, undoubtedly, is recognized in that section of the statute, before quoted, revised by Varick and Jones: *Where a defendant is acquitted, the people pay their own costs; the defendant his.* For any services which the Clerk may have performed *at the request* of the defendant, in the course of the prosecution, he ought to pay—his antagonist, (the whole community), should stand on no better ground:

not been uniform, and the bills charged by the Clerks, of late years, were considerably higher than those made by former Clerks.

Hoffman here called on William Wiley, and inquired of him whether the order, mentioned in the bills, for the appearance of the defendant, and for respiting the recognizance, were in fact ever entered in the minutes—and whether, in fact, such orders were ever entered in the case of Ruth Tucker.

The witness answered, that he did not know whether such orders were entered in that case. That the practice of the Clerks in this respect is, that on each day during term, a general order for the appearance of all persons bound by recognizance is entered in the book of minutes. Sometimes, however, through hurry or inadvertence, the actual entry of such order is omitted in the rough minutes; but when such minutes are engrossed, the order is always entered as and for each day during the term. The witness had understood that the former practice, in relation to the entry of these orders was, that an order was entered by the Clerk for each person; but that, of late years, the business of the Court having increased, the practice became altered as it now stands.

His Honor Judge Van Ness inquired of the witness, in what manner the Clerk or himself estimated the costs charged: whether a gross sum was generally charged, or the particular items of the bill were put down, in estimating the amount.

The witness answered, that he usually referred to the Clerk, to ascertain from him what the costs were in particular cases on each day; and sometimes, he, the witness, knowing the general amount of a bill, had charged and received a sum in gross, without making an estimate. The witness stated, that when the Clerk came to the Court, in the morning, he usually told the witness the amount of costs in particular cases in which he expected the costs would be paid, telling the witness, that the charges for the witnesses in the case or cases, were to be added. Macomb, in making out the amount of costs, generally figured on paper; and when a cause was settled, he, the witness, had understood the Clerk, in estimating the amount of costs, was governed by this rule taken from the taxed bill: $0,,73 were charged for the first day, and $0,,64 for each of the following days during the present or succeeding terms, while the case was pending, until the costs were paid.

The witness here produced several books of minutes taken in Court, each of which contained the minutes of two terms. It appeared, in general, from an examination of these books, that in very few instances, if in any, were the daily orders regularly entered; and the witness said, that as these were orders of course, they were seldom entered, except in the engrossed minutes.

His Honor Judge Van Ness said, that if he remembered right, the legal notion of a *respite*, as applicable to a recognizance, was—where a party, who had been bound by that obligation to appear in Court, or, to perform any other act, did not appear, or perform the act, according to the condition of the recognizance, and, by reason thereof, it became forfeited and liable to be estreated,* and the Court, for special reasons shown, makes a special order, that it lie over until the next term—this, he understood, was denominated the *respite* of a recognizance.

John A. Graham, a witness produced and sworn on behalf of the prosecutor, testified that he was employed as counsel in the case of Ruth Tucker, complained of for an assault and battery in the Court of Sessions, in August last. During that term he attended every day, and did not hear her name called. The last day of the term the witness inquired of Macomb about the costs, who told him,

* This being a technical term, we fear that its import may not be understood by all; and, while on the subject, it may not be amiss to explain other matters which are not familiar to the generality of readers:

A *recognizance* is an obligation of record, wherein the party becomes bound, (in this country) to the people, with one or more sureties, either before some Magistrate having competent authority, or, in open Court to appear in Court, to keep the peace, or for good behaviour, or for other purposes.

We cannot better explain the nature of a recognizance and the mode in which it is taken, than by supposing a plain common case. A. has a violent assault and battery committed on him by B. Whereupon A. goes to the Police and makes his complaint. A warrant is issued, and B. is brought in to be bound over. The Magistrates say to B.—"Under the circumstances of this case we shall require of you security by recognizance, yourself in the sum of 1000 dolls. and two sureties in the sum of 500 dolls. each." The sureties are brought, and one of the Magistrates has a blank recognizance filled up and signed by the defendant and his sureties.

The recognizance states, that on such a particular day, B. and C. D. of, &c. personally came before me J. H. one of the special Justices, &c. and acknowledged themselves to owe the people of the State of New-York, that is to say, the said B. the sum of 1000 dolls. and the said C. and D. each, the sum of 500 dolls. of good and lawful money, &c. to be levied and made of their respective goods and chattels, lands and tenements, to the use of the people of the State of New-York aforesaid, if the said B. shall fail in performing the condition following, viz.

The condition of this recognizance is such, that if the above-named B. shall personally appear, at the next Court,

that if the defendant would pay his costs, she might go without day. Isaac Tucker, the husband, paid $6,,25 to Macomb, and departed, expecting that it was all settled.

The next term an indictment was found by the Grand Jury, at the complaint of the same prosecutor as had appeared against her the term preceding. The witness, with a view of having the prosecution defended, on consulting with the husband, first had a plea of not guilty entered; but, on further consideration, advised to have that plea withdrawn, and that she should submit. A plea of guilty was accordingly entered, and the defendant was first fined $10 by the Court; but, on a representation made by the witness to the Court, the fine was reduced to six cents and costs, as related by two of the witnesses before sworn.

The witness well remembers, that when the costs were estimated by Macomb in this case, that he merely mentioned the amount, without making any calculation on paper. The witness had practised, as a counsellor, nearly sixteen years in the Court of Sessions; and, during the time that Macomb had been Clerk, never saw him make any estimate on paper of the amount of a bill, when called on by those about to pay the costs.

Gardenier here referred to the minutes and to the recognizances on file, in the several cases following:

1. In the case of William F. Bradbury, it appeared, that on the 4th of November, 1815, he was bound over, by recognizance, to appear and answer, in the Sessions, on a charge of felony. J. B. Thorp was his bail; the recognizance was continued until December term following, when he was discharged.

2. George Arnold was bound in like manner for assault and battery, in two recognizances taken in the Police; the one in which John White was surety, taken on the 18th of July, 1816, and the other, in which Thomas Bennet was surety, on the 2d day of August following. The defendant was tried and acquitted by the jury, no evidence appearing, and on the 5th day of August, during the same term, discharged on the payment of costs.

His Honor Judge Van Ness observing, that Bennet had been charged $12,,12, as appeared from the testimony on behalf of the defendant, he, the Judge, wished to know, and made the inquiry of the counsel for the purpose, how that amount of costs accrued.

Emmet said, that it appeared by a recurrence to the minutes, which he was then examining, that the recognizance was given in the case on the 18th of July, 1816, and the cause was tried on the 2d of August following: so that the matter was only one term in Court.

3. In the case of John Cummings and Timothy Keegan, it appeared that each of them were bound over to answer at the July term following, after the recognizance, which was dated on the 4th day of June, 1816, and on the 13th day of July, 1816, it appeared from the minutes, they were discharged on payment of costs.

4. In the case of William Messerve, it appeared that he was bound in a recognizance of $1000, on the 13th of October, 1816, to appear and answer at the term of November, 1816, and that the recognizance was continued unto the 14th of December following, when he was discharged.

5. In the case spoken of by William Sanford, in his testimony, it appeared by the minutes, that William Sanford, Michael Sanford, and Abraham Sanford, were bound over to appear at the term of February, 1816. The recognizances were continued until the

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&c. to be holden, &c. and then and there answer all such matters and things as shall be objected against him, and abide the order of the Court, and not depart without their leave; and, in the mean time, keep the peace, and be of good behaviour towards the people, &c. and particularly towards A. then this recognizance to be void, otherwise to remain of full force and virtue.

(Signed) B.—C.—D.

Taken and acknowledged before me, the day and year above-written.
J. H.

The recognizance, when taken, is put in a bundle with, perhaps, a great number of others. On the first day of the term, it is the duty of the Magistrates to return the recognizances; and if B. on being called by the Crier, does not appear, the recognizance is generally continued until B. be indicted, or some other proceeding takes place, and if he does not appear when required, the District Attorney may apply to the Court to order the recognizance to be estreated, which is done in the following manner:—The Clerk directs the Crier first to call B. to appear and answer according to the condition of his recognizance, or it will be forfeited: afterwards, if B. does not appear, the Crier is further directed to call C. and D. to bring forth B. for whom they are bound according to the condition of their recognizance, or it will be forfeited.

If, notwithstanding, during the term, B. by his counsel, comes and alleges some reasonable excuse why he did not appear, praying that the recognizance may lie over until the next term, the Court will so direct.

But, if neither B. nor his sureties appear, the Clerk *extracts*, or draws the recognizance of B. and his sureties from the other records, and sends it up to the Court of Exchequer. This is termed *estreating* the recognizance. Thus, the sum contained in the recognizance becomes a debt to the State, and a suit may be brought for its recovery.

term of March following, when Michael was indicted, convicted and fined six cents and the costs, for an assault and battery, and the other two were discharged on the payment of fees. There was only one recognizance produced in evidence, in relation to this affair.

6. In the case of John Anderson and Isaac Anderson, spoken of by Isaac Anderson, the father, in his testimony, it appeared that on the 6th of September, 1816, a recognizance was taken, in which he was bound for the appearance of his two sons for an assault and battery, who were both indicted. The recognizance was estreated on the last day of that term, for costs.

7. In the case of Edward P. Harrison, spoken of in the testimony of William Harrison, it appeared that the recognizance was taken, wherein Samuel S. Manning became surety, and the indictment for an assault and battery, was found on the same day, during the term of September, 1816, and on the last day of Court, the recognizance was estreated for costs.

8. In the case of John Smith, it appeared that on the 1st of March, 1816, a recognizance was taken in the sum of $500, on a charge of felony, and Thomas Phœnix became security. He was discharged on the 12th day of April, in the term of April following, on the payment of costs.

9. In the case of Henry Norris, junior, William Norris, and William Baker, it appeared that they were jointly recognized to appear at the term of April, 1816, on a charge of felony: they were indicted, and acquitted and discharged on the 12th day of the same month, on the payment of costs.

10. In the case of James Stoughton, it appeared that he was bound over to the term of January, 1816, as surety for Anthony Barclay and Francis B. Ogden, in the sum of $30,000, in case of a duel. The recognizance was continued until the term of March following, when he was discharged, on the payment of costs.

11. In the cases of Peter and John Van Alen, it appeared that the recognizances were taken on the 27th of December, 1815; on the 5th of January following, both were indicted; on the 7th of February, tried; on the 17th of the same month, fined $25 each: by the minutes, it appeared that eight witnesses were called and sworn in each cause, and the amount of costs was $32,,50.

12. In the case of John Osborne, James Maine, and Julius Carlisle, it appeared that they were bound over by recognizance, to appear and answer at the Sessions, in November, in a case of felony; and that, on the 11th of the same month, Maine and Carlisle were convicted, and Osborne, having turned State's evidence, was discharged, on the payment of costs.

Here the documentary evidence, on behalf of the prosecution, was closed.

Robert Macomb, a witness for the prosecution, on being sworn, was here examined by Mr. Maxwell.

Maxwell. As to the case of Arnold, you have heard the testimony on the other side. Did you, as Clerk of the Sessions, perform the services charged against him agreeably to the rules and practice of the Court?

Witness. I answer that inquiry with some qualification. The services were performed, according to the uniform practice of the Court, under all my predecessors. But the common orders for the defendant's appearance, and that the recognizance be respited, &c. instead of being entered on the minutes in that case, particularly, were entered, generally, in that, and all similar cases, as is usual, in all the minutes of the Court.

Question. Is your answer the same in relation to all the cases in which it is alleged by the witnesses on behalf of the defendant, that you have received costs?

Emmet objected to a general inquiry of that nature being put to the witness; and insisted that he should be examined as to each particular case.

Maxwell, (to the witness). Will you explain to the Court and jury the purport and object of the notices, sent to defendants from your office, requiring the payment of costs?

Answer. When a party is bound by recognizance to appear and answer in the Sessions, he cannot be discharged but on payment of costs, as will appear by the rules of Court. If the costs be not paid, the recognizance is forfeited for the same. And it is the duty of the Clerk to notify the party of such forfeiture, that he may redeem the same by paying the costs; otherwise the recognizance is estreated into the Court of Exchequer for prosecution. The notice alluded to is a printed notice, containing the name of the party whose recognizance is forfeited, and the amount of the recognizance, and apprising the defendant of the forfeiture. (The witness here produced a form of the notice issued by him, and of that issued by Edward W. Laight, his predecessor, to the same effect).

Question. In relation to the payment of $500 by Mr. Haight, as surety for Haviland, did you, or did you not, make use of any threat to enforce the payment of that money?

Answer. I made use of no threat whatsoever, but merely notified the surety that the recognizance was forfeited. Mr. Haight, whom I saw very shortly afterwards, stated that he was indemnified, and requested that no measures might be taken against him, as he was ready to pay the money.

Question. In the case of Keegan and Cummings, mentioned by Dr. Walker, were or were not their recognizances handed up from the Police?

Answer. With regard to those cases, they were certainly handed up by the Police, and their recognizances are on file in my office. Indeed—their names could not be before the Court, nor could their recognizances be in my possession in any other way: as we have no knowledge of any case, but from the returns of the Police, and other Magistrates.

Question. Did you charge William Messerve $16 and take 8, for the costs?

Answer. I cannot recollect the particulars of every case, thus hastily brought forward, after a long period. But I should think the costs in his case might easily amount to that sum, as it was considered a flagrant case, for which he was bound over in a large sum, and the case continued some terms in Court, so that the Clerk's and Crier's fees on recognizance alone, according to the taxed bills, would be considerable.

Question. What were the circumstances in the case of Osborne, Main and Carlisle?

Ans. Osborne was bound over on a charge of felony, and was indicted with the other two. He was afterwards admitted as evidence on the part of the State against the others, whom he convicted, and was discharged by Mr. Rodman, District Attorney, who directed a *nolle prosequi* to be entered, on payment of costs: which costs, by his express order, comprised the costs of all three.

The counsel for the defendant asserted that this was an anomaly—a thing which had never before been heard of in a Criminal Court—What! said they, a State's evidence to be subjected to the payment of costs!

Hoffman. Did you, in the case of Arnold, ever enter the order, that the defendant be called on his recognizance?

Answer. The common proclamation, and order that persons bound by recognizance to appear and answer—be called, and that their recognizances be respited, &c. were entered according to the established practice of the Court, since 1772.

Hoffman. This is the first time, I must confess, that I have ever heard of a common rule in criminal cases.

To the witness. It has been stated that you received $1000 from Mr. Haight and his co-surety, in the case of Haviland. Did you so receive that money?

Answer. I did; and credited it to the Court of Exchequer.

Hoffman. At what time was that money credited or paid by you into that Court?

Answer. During the May term of the Supreme Court, in 1815.

Hoffman. Will you please to look on this rule? [*Here the counsel handed the witness a copy of a rule in these words and figures:*]

In the Court of Exchequer, in the Supreme Court, of the term of August, in the year 1815.

Present, Mr. Justice Platt.

The People, vs. Haviland, Principal, Wheaton, Surety.	Sur. Recog.
The same, vs. The same Principal, Haight and Halstead, Sureties.	The like.

The Court having read and considered the petitions and affidavits filed in these several causes, *ordered*, that Robert Macomb, Esq. Clerk of the General Sessions of the Peace in and for the City and County of New-York, pay over to the Clerk of the Court, the sum of one thousand dollars; which appears to have been received by the said Robert Macomb, in the first case above stated; and that the consideration of the petitions of the above-mentioned sureties, for the remission of the forfeitures of their respective recognizances, be postponed until next term; and that in the mean time all further proceedings thereon be stayed—This being the first instance within the knowledge of this Court, in which monies on recognizances have been received by the Clerk of any Court, (excepting the Clerk of this Court), it is deemed expedient to notify the Clerk of the Sessions in New-York, that such receipts are altogether irregular and not allowable.

Extract from the minutes.

W. POPHAM, Clerk.

Hoffman, continuing the inquiry: Was that rule served on you?

Answer. It was; but I must be mistaken as to the time the money was accounted for; it must have been October, judging from the date of the rule.

Hoffman. Did you ever receive the sum of $250, being the amount of the fine of Philip M'Niff, who was convicted of a misdemeanor, in the Court of Sessions?

Answer. I did. M'Niff, after remaining many months in prison, gave an order to the Police to sell certain goods deposited in the Police Office, to pay his fine. They were sold by the Police, and the fine paid.*

Question. Was this money paid before or after his pardon?

Answer. I cannot recollect that he was pardoned.

Hoffman. Did you not know before this rule, in the case of Haviland, was served on you, that it was contrary to the rules of the Court of Exchequer, for Clerks of Criminal Courts to receive money on recognizances?

Answer. I did not. I conceived it to be my duty according to the construction which I had put on the statute, and according to the rules of my Court, to receive "*all fines, forfeitures, issues, or amercements, imposed or adjudged,*" in my Courts.† Judge Platt, however, immediately after the case alluded to, established the rule which has been read.

By his Honor Judge Van Ness. I know that the subject of this regulation made by Judge Platt, was agitated before all the Judges of the Supreme Court, and we unanimously concurred with him.

To the witness. Did you not remonstrate with Judge Platt, on the expediency of that rule?

Answer. I did.

Question. Did not Judge Platt continue to adhere to that rule, notwithstanding your remonstrance?

Answer. He did.

Question. Did you not know that his conduct, in that particular, was approved by all the Judges? *Answer.* I did not.

Emmet to the witness. In the case of George Arnold, it appears that Bennet was his surety; that the recognizance was taken on the 18th day of July, and that the principal was acquitted on the 5th of August following; that he paid Mr. Wiley $8,,43, and afterwards the surety paid $12. Now I wish you to point out the services performed by you, and explain the receipt of this money, even according to your own principle of charging.

Answer. Mr. Wiley receives almost all the fees of my office, and this money was received by him. I find that there were two cases, or recognizances against Arnold, and probably the costs may have been increased on that account. By referring, however, to Mr. Wiley's book of money received, I find that $12 only are entered as paid in the case of Arnold. It may be, however, that the recognizances were continued over, or some other duty performed to augment the costs. But it is impossible for me, without having time to refer to the records in the office, to ascertain the details of every case.

By his Honor Judge Van Ness. But see here, Col. Macomb—Arnold, it appears, was

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* See the case of this defendant reported 1. vol. p. 8 He was convicted of receiving stolen goods in January, 1816. We find, by recurring to the records, that after remaining in prison about six months, and having paid his fine, the remaining part of his punishment by imprisonment was remitted by pardon.

† We deem it but an act of common justice to Col. Macomb, to extract in this place the section of the statute declaring the duties of Clerks of Criminal Courts in this State, and also the certificate which follows. The statute will serve to elucidate this subject; and the certificate which was handed us by the witness for insertion, in connexion with the statute, may serve to explain this and some other parts of his testimony.

"That the Clerks of the several Courts of Record, in "this State, shall annually on the first day of October "term, make and deliver into the said Court of Exche- "quer, a just and true account and estreat of all *fines*, "*forfeitures, issues, and amercements*, imposed or ad- "judged, and of all recognizances forfeited before the "first day of September preceding the first day of the "said October term, in the respective Courts of which "they are Clerks, together with the said recognizances, "noting in every such account and estreat, where any "such fines, forfeitures, issues, or amercements, *have* "*been paid*, or the person committed for the same, to "whom such payment or commitment was made, and "what process has been issued, and to what officer, upon "pain that every Clerk, who shall neglect his duty "therein, shall forfeit his office and become answerable "for all such fines, forfeitures, issues, and amercements, "and the amount of all such recognizances as such Clerk "shall neglect to give an account of, and estreat and de- "liver as aforesaid." (1 Vol. R. L. P. 402, Sec. 6).

There is a *rule* of the Court of Sessions of August term, 1815, in conformity with this statute, *which* also requires the Clerk to notify parties of the forfeiture of their recognizances.

"The People, vs. Jonathan Haviland and Sureties. } Sur. Recognizance estreated, 1000 dollars.

I certify that the amount of the penalty of one thousand dollars has been credited in the account of Robert Macomb, in his account of monies received, with the State, in the Court of Exchequer:—And I further certify, that the said Robert Macomb has always rendered his account in the months of May and November annually.

W. POPHAM, Clerk of the Exchequer."

19*th July*, 1817.

acquitted August 5th, and the cause, at that time, must have been at an end. How then could the costs amount to $22?

Answer. As I have already stated, there were two complaints, or recognizances against Arnold, and, perhaps, one may have continued over, or some other duty performed; or possibly Mr. Wiley may have made a mistake in estimating the costs.

The Judge. It is true, there may have been some mistake in this affair; but that there were $12 and better received more than ought to have been, is, to my mind, clear, to a demonstration.

Mr. Emmet. Will you be so good as to state on what principle you demanded and received the sum of $15 costs from young Osborne, as spoken of by Mr. Ridebach?

Answer. Osborne was bound by recognizance to appear and answer, and Mr. Rodman, the District Attorney, ordered him discharged on payment of the costs of all the three, as already stated.

Emmet, on examining the book of engrossed minutes containing the order for the discharge of Osborne, observed that the words, "*on the payment of costs*," at the end of the order, appeared to be an interpolation made subsequent to the time of the entry.

Price. Col. Macomb, do you recollect the case of Dighton, who pleaded guilty to an indictment for forgery some time ago?

Answer. I do.

Price. Did you, or did you not, receive from him or his friends, $1500?

Answer. Dighton was recommended by the Court for pardon, on condition of paying that fine. He was accordingly pardoned, and the fine paid, which I have credited to the State.

Mr. Emmet. Col. Macomb, have you the recognizance in the case of Ruth Tucker and the book of original minutes containing the entry of the order for the *nolle prosequi* in the case of Osborne?

Answer. They are in my office.

Emmet. Will you produce them?

The witness then went to his office, and after being absent for sometime, was sent for by the counsel for the prosecution.

On his return, the counsel for the prosecution having conferred together and with the witness, Mr. Maxwell thus addressed the Court:

May it please the Court. Under the intimation so frequently expressed during the progress of this prosecution by the counsel for the defendant, that, in conducting his defence, it was not their intention to impute to Col. Macomb any corrupt motives in the discharge of his official duties, and that they do not charge him with extortion, I think proper to abandon this prosecution.

Hoffman. The Counsel for the defendant are not to be understood as having made any concession: they meant to be understood, and they wish it now to be understood, that they did not conceive it essential to the defence, that corruption should be proved against the prosecutor. All that they can say on this occasion is, that the construction of the publication, or the facts in this case, cannot be affected by any concession which it may be conceived we have made.

His Honor Judge Van Ness then spoke, in effect, as follows:

I have something to say in this case before the jury is discharged; and, in what I shall say, I do not think it necessary, nor do I intend, to impute any impure motives to Col. Macomb.

The Court of Oyer and Terminer is instituted, particularly, for the trial of cases of life and death, and sits in this city, regularly, but once a year.

It may, therefore, be expected, and I conceive it proper, in a case so important to the community as this, that I should state, in a general point of view, my opinion: I shall do so with freedom; while, at the same time, I hope that the result of this trial will afford a salutary lesson to all concerned.

It has appeared, in the progress of this trial, that in all cases where a recognizance has been taken, and a party bound over for his appearance at the Court of Sessions, that the Clerks of that Court have been in the habit of charging an order for the calling of the defendant, and also one for respiting his recognizance from day to day, for each day in term, and for the succeeding terms, until the recognizance is discharged by the payment of costs or otherwise.

This, in my view, is not the legal object of a recognizance.. The whole term of a Court is, in contemplation of law, but one day; and unless a special order is entered in the case, that the recognizance be respited from *one term to another*, I believe the charge to be wrong.

This is my firm conviction; and I hope that the opinion I have thus expressed on this subject, may be promulgated, by those who hear me, abroad in this community.

The jurors, without leaving their seats, pronounced the defendant *not guilty.**

The testimony of Isaac A. Anderson, before detailed, in the 96th and 97th pages, should stand thus: Isaac A. Anderson testified, that a year before last fall, two of his sons, John and Isaac, were complained of for an assault and battery, before the grand jury, who found a bill against them, as the witness was, shortly afterwards, informed by one of the police officers. His sons were never taken on the charge, but the witness came into court, and became security for their appearance. The second or third day afterwards, the affair was settled, and the witness paid to Macomb, for the costs, $14 50: having previously paid him, on becoming security, $2 or $3.

In the last line of the note in the 98th page read 83 for "33." In the 12th and 13th lines from the foot of the 1st column of the 104th page, for "forfeited" read estreated.

We are anxious that the preceding case, as far as relates to costs in criminal cases, should be fully understood by our readers; and for that purpose we subjoin the following sections of statutes relating to this subject, accompanied with some explanatory remarks.

Previous to the year 1808, the clerk of the circuit and sittings, in the city and county of New-York, was clerk of the court of oyer and terminer and general gaol delivery, and the clerk of the city and county of New-York was clerk of the court of sessions. In the month of March, in that year, the act was passed, creating the office of clerk of the court of oyer and terminer and of the sessions, and John W. Wyman was appointed the first clerk under that act. The fee bill of 1801, with the clause quoted in the second note, (p. 98, ante,) was then in force, and so continued until the year 1813, about two years after his removal. This act, so creating the office, in the first section, declares, that this officer "shall have and enjoy all the rights and powers, *receive and take all the emoluments*, and perform all the duties of the former clerks, in relation to the said courts of oyer and terminer and general gaol delivery and general sessions of the peace." (5 vol. Laws of New-York, before the last revision, p. 265, and incorporated into the revised laws of 1813, p. 338.)

In the third section of the same act it is further enacted, "that in all cases where persons shall be bound over and enter into recognisances for their appearance at either of the said courts, &c. and shall make default in appearing agreeably thereto, and the same shall be estreated, the account of the said clerk, for his fees in such case, shall be audited by the court of exchequer, and paid out of the moneys arising from the forfeiture of such recognisances." This section is also incorporated into the 1st vol. N. R. L. p. 338.

It is further enacted, in the laws of 1808, p. 346, "that it shall be the duty of the court of exchequer to audit and pay, from time to time, out of the fines and forfeitures in the courts of oyer and terminer, &c. and general sessions in the city and county of New-York, to the clerk of the said courts, his reasonable account for the fees arising on trials for capital or other offences, where the persons tried are in custody, *or where, by the judgment or order of the court, the clerk cannot obtain his fees.*"

This section is also incorporated into the new revised laws. (1st vol. p. 404. sect. x.)

Now we have seen that the section of the statute, in the revised laws of 1801, p. 83, (see note 2d, p. 98, ante,) was omitted in the revision of 1813. But the court of sessions, in August, 1815, passed a rule in conformity with the section so omitted: no doubt grounding themselves on the authority derived from the first section of the act of 1808, creating the office, as above mentioned, and on the implied authority given in the latter clause of the section, before quoted, from the 1st vol. of the N. R. Laws, p. 404, sect. x.

We have also seen what the specification of charges, by the clerks of the court of sessions, has been, from the year 1732 until the present time. (See note, ante, p. 102.) Now we would suggest whether a statute is not requisite, regulating the specifications of charges by clerks of criminal courts on recognisances, and declaring in what cases a

* This is a *matter of course* in all criminal cases where the prosecution is abandoned. (See the 5th and 6th lines in the second column of the preceding page.) But we wish, in all cases, as far as may be in our power, not only to avoid, but to atone for *incorrectness* or *imperfection*. (See the note in the 2d page of the Evening Post, of the 12th August, 1817.)

defendant shall be subjected to the costs of a criminal prosecution, and in what cases *such costs shall be audited and allowed to the clerk by the court of exchequer.*

But from the foregoing, or from any other remarks, we have ventured to make in the progress of this case, we wish not to divert the attention of the reader from the real grounds on which the case stands. We wish it to be distinctly understood, that what we have advanced on the subject of costs in criminal cases *in general*, is but collateral to the main subject, and designed solely for elucidation. We have wished to present to our readers the whole law on this subject.

It has been shown in this case, on behalf of the defendant, beyond the possibility of a doubt, that the present clerk of the court of sessions has not confined himself, in his charges, to any known practice, or to any established rule.

He had, in one instance, undertaken to discharge a defendant who had been merely bound over for her appearance at the police. He received the full costs of a term, though her name had never been called in the court that term; and afterwards, the complainant having actually preferred a bill of indictment, the clerk received the full costs of another term; and an attempt was then made to collect of the same defendant the full costs of both terms, then already paid, including a fine of $10, which had been reduced by the court to six cents. (See pages 93 and 94, ante.) The recognisance in this case, when called for by the defendant's counsel, was not produced. (See page 108.)

He had, in another instance, received, or there was received in his office, more than $12 for the costs of one term, the full costs of which had been previously paid. (See pages 94 and 95.) He had charged and received, in another case, more than $18 where the cause was never in court, or ought never to have been there, as it had been previously settled in the police, and no fees, payable to him, could legally accrue. (See pages 96 and 97.) He had received of a young man, *who had turned state's evidence against two others, and produced their conviction*, $15, the alleged costs against the three; when it was, at least, *extremely doubtful* whether any costs could legally be charged against the approver. He, the clerk, refunded $11 of this same money under very degrading circumstances. (See page 96.)

He had, in fine, made a demand of $1000, the amount of a recognisance forfeited to the state, of the sureties, just before the May term, alleging that it was necessary for him to make his returns to the court of exchequer the same term. He neglected to make his return, or render his account, of this money, *until after the August term*, when a rule of the court of exchequer, requiring the payment of this same money into that court, was served on him. (See pages 97 and 106.)

Such are some of the prominent grounds on which this case stands—such was the defence to the prosecution, and in that situation this cause must be considered. It cannot be placed on a different ground.

Men in office, agents and servants of the people, created solely for their benefit; you hold a sacred trust—an awful responsibility is imposed upon you. You have to deal, perhaps, with the poor—with the unwary—with the man ignorant of his rights, or the law, on which a charge you may make against him, in the course of your official duty, may be founded. Be so much the more indulgent—so much the more circumspect—so much the more guarded. Remember the solemn oath—the promise you made to your God when you first assumed the functions of your office. From that moment determine to preserve an uncorrupted integrity, and to have your official conduct, in relation to others, correspond, in every particular, with that rule in the records of eternal truth, which teaches you "*to do to others as you would that others should do unto you.*" Know that this people, whom you profess to serve, are ever jealous of their rights. Every step, every movement you make, in the sphere of your official duty, is watched with the eyes of an Argus—with the vigilance that guarded the golden fruit of Hesperia. Beware of the least deviation from the line of strict integrity; and let your official conduct be such that you shall be able, at any moment, to explain every detail thereof, to the satisfaction of the most scrupulous.

So, in the hour of tribulation, when *friends* fail and adversaries thicken around, you will face a torturing interrogation with fortitude, and the most scrutinizing investigation with calmness. You will do even more: for, conscious of your own innocence, whatever may be the event, you will make your ul-

timate appeal to the tribunal of your own conscience for the rectitude of your conduct. Here you will be supported and held as by an anchor, firm and steadfast, which will enable you to ride out the turbulent storm amidst the raging elements which threaten to overwhelm you.

(BIGAMY.)

ELIZABETH STEERS' CASE.

MAXWELL, *Counsel for the prosecution.*
GARDENIER and WILSON *Counsel for the prisoner.*

In a prosecution for bigamy, the former marriage, in fact, must be proved.

On the traverse of an indictment for bigamy against S. for that on the 16th March 1815, she married J. S. and afterwards, to wit, on the 25th of May, 1816, married E. the said J. S. being alive &c. contrary to the form of the statute, &c. it appeared by the testimony of K. a divine, that, on the day first above mentioned, he married a woman of the name of S. to J. S. but that he, K. did not know that S. the prisoner, was the same person he so married; it was held, that although this was sufficient evidence of a marriage *de facto* of the person by the name of S. and, therefore, that collateral evidence, to identify such person, might be given, yet that the prosecutor should be precluded from establishing the second marriage, by cohabitation, or otherwise, without first proving that S. the prisoner, was the identical person so married by K.

It seems that, in such case, even a representation, or confession, by S. the prisoner, to third persons, made subsequent to the time of the marriage by K. *that she was the wife of J. S.* is not sufficient evidence of such marriage.

The prisoner was indicted for bigamy; for that on the 16th day of March, 1815, at the city and within the county of New-York, she married John Steers, and afterwards, to wit, on the 25th day of May, 1816, at the same place, married William Englis, he the said John Steers being alive, and she, the said Elizabeth, well knowing the same, contrary to the form of the statute, &c.

Maxwell, in opening the case, stated, that it would appear from the testimony that the prisoner, on the day first mentioned in the indictment, was married to John Steers by the Rev. Gerardus A. Kuypers. The husband was a seafaring man, and soon after the marriage went on a voyage to the East Indies. On his return he found his wife married to another. In the absence of the former husband, she went to the same divine, and was married by him to William Englis.

The Rev. Gerardus A. Kuypers was hereupon called and sworn as a witness on behalf of the prosecution. He stated that it appeared from his register of marriages that in March, 1816, he married a woman by the name of Elizabeth Hewlett to John Steers; but that he, the witness, does not recollect that the prisoner is the same woman he so married.

Benjamin G. Minturn was here sworn as a witness on behalf of the prosecution, and stated that, in June, 1815, John Steers, the prosecutor, went out to the East Indies in one of the vessels of which the witness was part owner, and returned about eleven months ago.

Maxwell inquired of the witness, whether, in the absence of Steers, the prisoner did not frequently come to the store of the witness, and represent herself as the wife of Steers, and get goods on his account.

The evidence was objected to by Wilson, on the ground that the marriage spoken of by the witness first above named, should be first proved. The Counsel stated it to be an invariable rule in the English courts, in the case of bigamy, that a marriage, *de facto*, should be clearly established. In support of his argument, he cited 1 Doug. Rep. 171. and 7th Johns. Rep. 314.

Maxwell contended, that a marriage of the person by the name of the prisoner having been proved, her confession, which he now offered to prove by the witness last named, ought to be received. The evidence was offered for the purpose of showing the prisoner to be the same person married by the Rev. Dr. Kuypers. In England, the rule laid down in the case of Morris v. Miller, (4 Bur. 2059.) that a marriage in fact must be proved, had been exploded by the subsequent case of Truman, for polygamy, tried in 1795 (1 East's Crown Law, p. 470.)

His Honour the Mayor observed, that a marriage in fact, of a person of the same name of the prisoner, having been proved, the only remaining proof related to the identity of the person. Her acknowledgment, that she was the wife of Steers, would not show that she was the same person married

by Dr. Kuypers, as related in his testimony. The court did not think it absolutely necessary that the Minister who performed the ceremony should be able to identify the person; but some connexion, by means of collateral evidence, should be shown between the prisoner, and she who was married by the Rev. Dr. Kuypers.

Maxwell inquired of Minturn, whether the prisoner did not come to his store with an order from John Steers, as her husband, and receive his wages.

On a further objection to this testimony, the court decided, that this prosecution being founded on a penal statute, a marriage in fact must be proved. In this case such marriage had been proved of a person by the same name of the prisoner. Without first showing that this was the same person married by the Rev. Dr. Kuypers, the public prosecutor proposed to show, by the declarations of the prisoner to Mr. Minturn, that she was the wife of John Steers. The court considered this testimony too slight to prove the first marriage. In England there is a statute requiring the registry of marriages, and the register is evidence *de facto* of the marriage. But in this country we have no such act; but still the same rule prevailed here, on a prosecution of this nature, as in that country. The first marriage, in fact, must be proved.

The prisoner was acquitted by the Jury.

SUMMARY.

(FORGERY.)

George Harrison pleaded guilty to two indictments for forgery. The one for forging a promissory note, bearing date on the 18th day of 6th month, 1817, payable three months after date to Cornel Cauldwell & Son, or order, for $ 137, signed by Nelson & Mott;—the other for forging another promissory note, bearing date on the 18th day of 3d month, payable three months after date to Messrs. Cauldwell & Son, for $1,187, signed by Nelson & Mott.—The prisoner passed the note first mentioned to David Cummings, (30 North Moore,) and the other to David Leek in the Bowery. Both the notes purported to have been endorsed by their respective payees. The prisoner was recommended to pardon on condition of leaving the United States.

(GRAND LARCENY.)

Isaac F. Barker was convicted of stealing a horse of the value of $ 150, the property of Lancaster Palmer and Joseph D. Palmer. The prisoner got the animal into his possession by pretending to the owners that he wanted to hire him to go to Vandamme-street. He disposed of the creature to James R. Post for $70.

The prisoner was sentenced to the State Prison three years and a day.

John Johnson, for stealing the goods of John West, was sentenced to the State Prison the same period of time.

Susan Johnson, convicted during the term of April last, (see Summary, ante p. 59.) was also sentenced to the State Prison the same time as the two preceding prisoners.

(PETIT LARCENY.)

Jacob Stephens, John Anderson, Jos. Ferdinand, John Holden, Mary Kingston, Parker Blake, Dennis Murphy, Solomon Green, Joseph Prince, Susan Thompson, Edmund Small, Samuel Spears, James Ellis, John Nelson, Henry Lockwood, John Toner, Michael Treadwell, John Bassett, and *John Peters*, were each convicted of this offence, and the first-named prisoner was sentenced to the Penitentiary three years, the four following for one year each, the four following for six months each, the three following for three months each, and the remainder for shorter periods of time.